FILE COPY

OCT 26 1942

No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1942

IN RE WILLIAM V. BRADLEY, PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	9
Conclusion	15

CITATIONS

Cases:	
Brule, In re, 71 Fed. 943	13
Davis, Ex Parte, 112 Fed. 139	10
Lange, Ex Parte, 18 Wall. 163	9
McKee v. *United States*, 126 F. (2d) 470	15
Millinockett Theatre, Inc. v. *Kurson*, 39 F. Supp. 979	13, 15
Nye v. *United States*, 313 U. S. 33	13
Pendergast v. *United States*, No. 183, this Term	15
People v. *Siman*, 284 Ill. 28	11
Robinson, Ex Parte, 19 Wall. 505	10
Savin, Petitioner, 131 U. S. 267	13, 14
United States v. *Patterson*, 26 Fed. 509	14
Warring v. *Colpoys*, 122 F. (2d) 642	15
Wilson v. *United States*, 26 F. (2d) 215	10
Wimberley v. *United States*, 119 F. (2d) 731	14, 15
Yavorsky v. *United States*, 1 F. (2d) 169	11
Statute:	
Judicial Code (28 U. S. C., 385):	
Section 268	2, 12, 13
Miscellaneous:	
Anno. 49 A. L. R. 494	11

491810—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 473

IN RE WILLIAM V. BRADLEY, PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The circuit court of appeals did not deliver an opinion. The order and judgment containing the findings of the circuit court of appeals is printed at R. 69–70.

JURISDICTION

The order and judgment of the circuit court of appeals were entered September 28, 1942 (R. 69–70). An order amending the judgment was entered October 1, 1942 (R. 70–71). The jurisdiction of this court is invoked under the Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a circuit court of appeals, having erroneously sentenced the petitioner in a contempt

proceeding to a fine and imprisonment under a statute permitting the imposition of either punishment but not both, may amend its order to sentence the petitioner to imprisonment only, after the fine had been paid.

2. Whether in fact the petitioner was guilty of contempt of the authority of the circuit court of appeals.

3. Whether the petitioner's misbehavior was in the presence of the court or so near thereto as to obstruct the administration of justice.

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C., 385), which is derived from Section 17 of the Judiciary Act of 1789 (1 Stat. 73, 83) and the Act of March 2, 1831 (4 Stat. 487), provides:

> The courts of the United States shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

This case arose upon an order of the Circuit Court of Appeals for the Third Circuit issued on its own motion directing the petitioner to show cause why he should not be adjudged guilty of contempt of court for endeavoring in the corridor adjoining the courtroom to intimidate a witness who was about to testify in a pending proceeding (R. 2). The material facts developed at the hearing upon the petitioner's return (R. 3) may be summarized as follows:

On September 14, 1942, about 10:30 a. m., one Kapelski came to the United States Court House in Philadelphia, Pennsylvania, to testify on behalf of the company in a civil contempt proceeding entitled *National Labor Relations Board* v. *Delaware-New Jersey Ferry Company.* At that time he was not under subpoena but had come at the request of one Josendale, a company official, upon the assurance that he could return to his work at eleven o'clock. (R. 6–7, 14, 22.) Kapelski was General Manager of the Delaware River Ferry Company. His company was not interested in the litigation but it did have a collective bargaining agreement with the union which had initiated the Labor Board proceeding, United Marine Federation Local No. 333. (R. 5, 7, 35–36.) The petitioner is the President and business manager of that union (R. 30).

On his way to testify Kapelski, who was accompanied by Josendale, entered the courthouse and went up to a corridor on the second floor which is entirely set aside for the use of the United States courts (Pet. 2). As Kapelski and Josendale proceeded along the corridor toward the courtroom of the circuit court of appeals, they met the petitioner at a point fifty (R. 24) or one hundred (R. 12) yards away from the courtroom door. According to Josendale's testimony this conversation followed (R. 24–25):

> Why, Mr. Kapelski says, "Hello, there." And, in fact, they both said the same thing in one breath—"What are you doing up here?"
>
> Captain Bradley shook hands with Mr. Kapelski and myself. Mr. Kapelski said, "I am up here with Josendale testifying against this Herbert Garrison."
>
> Captain Bradley says, "That is what I am here for, on this Ferry Company case."
>
> Mr. Kapelski says, "Well, I am testifying against Herbert Garrison." He says, "You know, I hired him, and you know I fired him; you know he is no good."
>
> Captain Bradley said, "What do you mean? You are testifying against us."
>
> Mr. Kapelski says, "Well, Mr. Josendale asked me up here and I can't do but tell the truth."
>
> Captain Bradley says, "You are"—he says, "You are going to get a damned good fucking."

Mr. Kapelski says, "Now, wait a minute; wait a minute."

Captain Bradley raised his hand. He says, "The hell with you." He turned around and walked up the corridor.

Kapelski and Bradley gave substantially the same account of the incident as Josendale (R. 8–9, 31). After it ended, Kapelski went on to the courtroom door but left about 11:30 a. m. without testifying (R. 7, 10, 14). On the two following days Kapelski was present and testified pursuant to a subpoena (R. 6, 10).

The evidence was conflicting as to whether the petitioner's remarks were intimidating. He testified that the expression used was common along the waterfront and that he intended only to say that the Delaware-New Jersey Company would lose the pending case (R. 31–33). He also testified that he had nothing to gain by threatening Kapelski (R. 33), although it was clear that his union had an indirect interest in the pending proceeding because the employees alleged to have been wrongfully discharged and not reemployed, had been union members (R. 34–36). Kapelski was a reluctant witness and gave evasive answers concerning how he had understood the petitioner's remarks (R. 15–22). He testified that he did not consider them as a threat of bodily harm (R. 15). In answer to the question whether he considered them a threat to the contract between his company and the petitioner's union, Kapelski paused but

answered "No" (R. 19, see also R. 20). But he also testified that day to day relationships with the union were of real importance to his company (R. 21–22) and that he was conscious of their importance at that time (R. 19–20). The extent to which this feeling influenced him was brought out on cross-examination (R. 16–17):

> Q. Did you in any way alter, change, or modify any testimony as the result of anything that Bradley said to you?
>
> A. (The witness did not answer.)
>
> Q. Did you understand the question, Mr. Kapelski?
>
> A. No.
>
> Q. Now, the "no" is to what—to my question?
>
> A. To your question.
>
> Q. Then I understand you to mean that you did not modify or change your testimony as the result of what Mr. Bradley told you. That is right, isn't it?
>
> A. May I answer that in—the thing is probably on the very first day, probably, I did not understand some of the questions that were asked me, and I probably was not as frank with them as I should have been. I didn't explain them all as clearly as I should have.
>
> By Judge MARIS:
>
> Q. On the first day, Mr. Kapelski, you did not indicate in any way that you were dissatisfied with the services of Herbert Garrison, did you?

A. On the first day?

Q. Your first day's testimony.

A. That is correct. If I recall——

Q. In other words, you withheld that information from the Court, did you not?

A. I withheld that, Your Honor, and I think the following day you asked me all those questions.

Q. And you frankly stated the whole situation?

A. I did, sir.

Q. Undoubtedly so. Now, isn't it a fact that your reticence on the first day was due at least in part to your conversation with Mr. Bradley?

A. It probably could have been in a sense, because I was—well, I don't know—I was more or less——

Q. You were——

A. I was confused.

Q. You were, as you said, "in the middle."

A. That is right.

The transcript of the testimony given by Kapelski on the two days in question was introduced in evidence (R. 10–12, 46–68). On September 14, Kapelski had gone to the courthouse to testify that he had discharged Garrison "because he was no good" (R. 23). Nevertheless, after meeting the petitioner in the corridor, Kapelski testified on September 15 that Garrison was discharged "for the simple reason that he was an extra man" (R. 55). On September 16, however, after being

admonished by the court, Kapelski explained that he had considered Garrison an unsatisfactory workman (R. 60–66).

After the close of the evidence the court found that the petitioner Bradley had intentionally intimidated Kapelski who was in the corridor adjoining the courtroom for the purpose of testifying in a pending proceeding, and that Kapelski was so intimidated that he gave false, perjured and incomplete testimony (R. 69–70). The court adjudged the petitioner guilty of contempt and ordered that he be imprisoned for six months and pay a fine of $500 (R. 70). A supersedeas and bail were denied and the marshal took the petitioner in custody (R. 48).

Three days later, we are informed,[1] the petitioner paid the amount of the fine to the Clerk of the circuit court of appeals (cf. R. 2). Thereafter on the same day the circuit court of appeals without a hearing issued an order amending the earlier order by striking out the sentence to pay a fine but

[1] We are informed by William P. Rowland, Clerk of the Circuit Court of Appeals for the Third Circuit, that some time on October 1, 1942, $500 in cash was paid to him in payment of the fine. Thereafter on the same day before he had deposited the money in the Clerk's account, the order amending the judgment was filed. He notified counsel for the petitioner that they were entitled to a remission of the fine, but counsel have refused to accept the money. The Clerk has not deposited the money in his Clerk's account nor has he paid it into the Treasury, but he still holds it awaiting further instructions.

leaving in force the sentence to imprisonment (R. 70–71).

On October 22, 1942, a petition for certiorari was filed and an application made for bail. The Solicitor General has not been formally served with these papers. On October 24, 1942, the Court requested the Solicitor General to file before 11 a. m., October 26, 1942, a response to the petition for certiorari, and to suggest appropriate bail in the event that bail is allowed. This memorandum is submitted in response to such request.

ARGUMENT

I

The action of the circuit court of appeals in striking from its order the provision for a fine and leaving in effect the sentence of imprisonment although the fine had been paid, probably conflicts with the decision of this Court in *Ex Parte Lange*, 18 Wall. 163. In the *Lange* case the facts were as follows: Lange was convicted for an offense punishable by a fine *or* imprisonment and was sentenced to pay a fine *and* to imprisonment. On the same day Lange was committed to jail in execution of his sentence and on the next day the fine was paid to the clerk, who paid it into the Treasury. Thereafter, the sentence was vacated and Lange was sentenced to imprisonment only. On petition for a writ of *habeas corpus* this Court

held that Lange should be released from custody. The Court said (p. 176):

> We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. * * * The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offence, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offence was at an end. * * *

The *Lange* case differs from the present controversy in one respect only. In both cases the initial sentence was excessive, for the contempt statute permits imposition of a fine or imprisonment, but not both.[2] In the *Lange* case, however, the sentencing court was powerless to restore the fine because the money had been paid into the Treasury; in this case the court below was ready to make restitution on the very day on which the fine was paid and since then has held the money for the petitioner (see p. 8, n. 1, *supra*). Conse-

[2] See *Ex Parte Robinson*, 19 Wall. 505; *Ex Parte Davis*, 112 Fed. 139 (C. C. A. 5); *Wilson v. United States*, 25 F. (2d) 215 (C. C. A. 8).

quently, it might be argued that the rationale of the *Lange* case is inapplicable here because, except for his own unwillingness to accept the money, the petitioner would have been restored substantially to his former position and therefore did not endure one of the alternative punishments.

This distinction was pressed upon the court below in *Yavorsky* v. *United States,* 1 F. (2d) 169 (C. C. A. 3), but was rejected by it in a decision squarely conflicting with its action in the instant case. Likewise, there is nothing in the *Lange* opinion to sustain the argument except a passing reference to the fact that the money had passed beyond the control of the court (p. 175). And, there appear to be numerous decisions in the state courts holding that a prisoner sentenced to a fine and imprisonment where only one is proper is entitled to his release upon payment of the fine. See *People* v. *Siman,* 284 Ill. 28; Anno. 49 A. L. R. 494. Under such circumstances any limitation upon the *Lange* case should be established by this Court. It follows that this is an appropriate case for granting a writ of certiorari.[3]

But although we believe the writ may be appropriately granted, we are not prepared, without an opportunity for more mature consideration, to suggest that the distinction noted has no signifi-

[3] Since the court below probably lacked power to issue the order amending the judgment, whether or not a hearing was held, it is unnecessary to consider whether the petitioner was entitled to notice of the proposed amendment.

cance or that the judgment below should be vacated.

II

There can be no question but that the circuit court of appeals was warranted in finding that the petitioner intentionally intimidated Kapelski for the purpose of influencing his testimony, and this question of fact plainly does not require further review by this Court. The words were susceptible of an intimidating meaning and the finding of the court below is supported by Kapelski's testimony that he withheld relevant information as a result of the encounter and by the transcript of the testimony given by Kapelski at the hearing in the Labor Board case, which showed that on the first day he had not given the information which he had come to court intending to testify.

Petitioner suggests that his misbehavior did not constitute the offense of contempt because the witness Kapelski was not under subpoena. But the fact that the intimidation is directed against a witness who appears voluntarily makes it no less contumacious of the authority of the court to discover the truth and no less dangerous to the proper administration of justice. While attempting to induce disregard for a subpoena may constitute an offense punishable as contempt, corrupting a witness is itself a separate and independent obstruction. And under Section 268 of the Judicial Code that misbehavior is not cured

of its contemptuous character by the voluntary nature of the witness' appearance. Cf. *In re Brule*, 71 Fed. 943.

It is likewise plain that this misconduct was punishable summarily under Section 268 of the Judicial Code (28 U. S. C., 385). It occurred in the building housing the court in a corridor leading to the courtroom at a time when the petitioner was leaving the courtroom and the witness Kapelski was arriving there to testify. The entire floor on this side of the courthouse is exclusively occupied by the United States courts and their facilities. We submit that in these circumstances the decision in *Savin, Petitioner*, 131 U. S. 267, is decisive of the present case and that further review is unnecessary. In that case the misconduct occurred first in the juryroom which was a few feet from the courtroom and was being used as a witness room and second *in the hallway of the court building* immediately adjoining the courtroom[4] (pp. 269, 278). The Court held that both acts of misconduct were summarily punishable under Section 268 because they were committed "in the presence of the Court". The ruling that the presence of the court extended to the hallway leading to and adjoining the court was not questioned in *Nye* v. *United States*, 313

[4] The statements to the contrary in the petitioner's brief (Pet. 13, 14) reflect a misapprehension of the facts in the *Savin* case.

U. S. 33; that case was concerned with the question whether misbehavior not in the presence of the court occurred "so near thereto" as to obstruct the administration of justice.[5]

But even if the summary punishment of the contemptuous behavior in the instant case was bottomed on the proposition that the misconduct was committed "so near" to the presence of the court as to obstruct the administration of justice, no inconsistency with the *Nye* decision is shown. Unlike the misbehavior in that case which occurred about 100 miles from the court, the misconduct in this case occurred "within the vicinity of the court and in any normal meaning of the term" (p. 52). Nor is any inconsistency shown with decisions in the lower courts since the opinion in the *Nye* case. In all of them, including *Wimberley* v. *United States*, 119 F. (2d) 731 (C. C. A. 5), and *Millinockett Theatre, Inc.* v. *Kurson*, 39

[5] The petitioner points out that the court had not yet convened at the time when he threatened Kapelski. But the parties and their witnesses were gathered to go forward with the proceeding, and only a few minutes remained (R. 40) before the hearing for which they were gathered would formally open. In the circumstances of this case, therefore, no significant distinction can be premised on the absence of a formal convocation of the court. Power of the court to protect "the place of justice" against "scandal and corruption" (*Savin, Petitioner*; *supra*, at 277) is not so limited that it is not as effective while the parties are assembling as it is after the hearing has formally begun. *United States* v. *Patterson*, 26 Fed. 509.

F. Supp. 979 (D. C. Maine),[6] cited by petitioner, the misconduct sought to be summarily punished occurred at a considerable distance from the court.[7]

CONCLUSION

For the foregoing reasons we believe that the petition for certiorari should be granted, limited to the first question presented in this memorandum.

The Court has requested that the Solicitor General recommend the amount of bail to be fixed in the event that the petitioner is admitted to

---

[6] *Wimberley* v. *United States*, *supra*, involved an attempt to influence a juror at his home 60 miles from the court two days before the court met. *Millinockett Theatre, Inc.* v. *Kurson*, *supra*, involved the destruction of business records in the office of the litigant. *Warring* v. *Colpoys*, 122 F. (2d) 642 (App. D. C.), involved the corruption and attempted corruption of jurors some days before the trial and some distance from the courthouse, although in the city in which the court sat. *McKee* v. *United States*, 126 F. (2d) 470 (C. C. A. 6), involved an attempt to influence a bailiff and a petit juror in the anteroom of the county jail which was located two or three blocks from the courthouse.

[7] The grant of certiorari in *Pendergast* v. *United States*, No. 183, this Term, does not require similar action in the instant case. If the misbehavior involved in that case is held to be summarily punishable under Section 268, the decision of the circuit court of appeals in this case will be consistent with it. If the misbehavior in that case is held not to be summarily punishable under Section 268, the decision below will not be at variance with that holding because factually the cases are entirely different.

bail. It is our recommendation that the petitioner be released upon his own recognizance.

Respectfully submitted,

OSCAR COX,
Acting Solicitor General.

ARCHIBALD COX,
Attorney.

OCTOBER 26, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942